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No. 10-751

In the Supreme Court of the United States

OMAR KHADR ET AL., PETITIONERS

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a district court considering a habeas corpus petition may require the Executive to provide advance notice before releasing a detainee from military detention and sending him to a foreign country, where the Executive has submitted sworn declarations establishing that a detainee will neither be sent to any country where he is more likely than not to be tortured nor be detained at the behest of the United States.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*, 553 U.S. 723 (2008) 3, 10
Demore v. *Kim*, 538 U.S. 510 (2003) 13
Estes v. *Texas*, 381 U.S. 532, 542 (1965) 10
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 13
Khouzam v. *Attorney Gen.*, 549 F.3d 235 (3d Cir. 2008) 14
Kiyemba v. *Obama*:
561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010) ..... *passim*
130 S. Ct. 1880 (2010) 5, 6
Medellin v. *Texas*, 552 U.S. 491 (2008) 11
Mironescu v. *Costner*, 480 F.3d 664 (4th Cir. 2007), cert. denied, 552 U.S. 1135 (2008) 11, 14
Mohammed v. *Obama*, 131 S. Ct. 32 (2010) 6
Munaf v. *Geren*, 553 U.S. 674 (2008) 4, 5, 8, 9, 10, 14
Naji v. *Obama*, 131 S. Ct. 32 (2010) 6
Noriega v. *Pastrana*, 564 F.3d 1290 (11th Cir. 2009), cert. denied, 130 S. Ct. 1002 (2010) 15
Sale v. *Haitian Ctrs. Council*, 509 U.S. 155 (1993) 12

Case—Continued: Page

Trinidad y Garcia v. *Benov*, 395 Fed. Appx. 329 (9th Cir. 2010), petition for reh'g en banc granted (Feb. 28, 2011) 14

Constitution, treaty, and statutes:

U.S. Const. Art. I, § 9 (Suspension Clause) 10

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 5

Art. 3 ..... 11, 12, 13, 14, 15

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 1

Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note) 12

§ 2242(d), 112 Stat. 2681-822 12

Military Commission Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2631 15

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(B), 119 Stat. 310-311 13

8 U.S.C. 1252 ..... 12, 13

8 U.S.C. 1252(a)(4) 13, 14, 15

8 U.S.C. 1252(a)(5) 13

28 U.S.C. 2241 ..... 12, 13

Miscellaneous:

136 Cong. Rec. 36,198 (1990) 11

Miscellaneous – Continued: Page

Exec. Order No. 13,492, 3 C.F.R. 203 (2009 Comp.) ... 1, 2
§ 1(c) ... 2
§ 2(d) ... 2
§ 4 ... 2
§ 5 ... 2

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 24a-26a) is unreported. The order of the district court (Pet. App. 31a-33a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2010. The petition for a writ of certiorari was filed on December 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. In Executive Order No. 13,492, 3

C.F.R. 203 (2009 Comp.), the President directed a panel of Executive Branch officials led by the Attorney General to undertake "a prompt and thorough review" of each Guantanamo detainee in order to determine whether transfer, release, prosecution, or some other disposition of the individual was consistent with the national-security and foreign-policy interests of the United States and the interests of justice. *Id.* §§ 1(c), 2(d), 4. For individuals the panel determined could be repatriated or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5. On May 15, 2009, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer.

For any transfer, a key concern of the United States is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Before transferring a detainee, the Executive (typically through the Department of State) assesses issues concerning humane treatment of the detainee in the country of proposed transfer. The United States has provided sworn declarations to the courts below setting forth the process used to determine, before a detainee is transferred, that the transfer would be consistent with the government's post-transfer humane-treatment policy. Gov't C.A. Reply to Petrs.' Consol. Resp. to Apr. 29, 2010 Order to Show Cause, Exhs. 1-3 (Decl. of Clint Williamson, then–Ambassador-at-Large for War Crimes Issues, Department of State (July 7, 2008) (Williamson Decl.); Decl. of Sandra L. Hodgkinson, then–Deputy Assistant Secre-

tary of Defense for Detainee Affairs (July 9, 2008) (Hodgkinson Decl.); Decl. of Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, Department of State (Nov. 25, 2009) (Fried Decl.)). Each of those declarations explains that the United States will not repatriate or transfer any detainee to a country where the United States believes it is more likely than not that he will be tortured. Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 4; Fried Decl. ¶¶ 3-4. The declarations also explain that once detainees are transferred to third countries, they are "no longer in the custody and control of the United States." Hodgkinson Decl. ¶ 5. Any further detention after transfer would be "by the foreign government pursuant to its own laws and not on behalf of the United States." *Ibid.*

2. Petitioners challenged the lawfulness of their detention by filing petitions for writs of habeas corpus. Shortly after this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the district courts transferred the cases to a single judge for purposes of coordination and management. Order, *In re Guantanamo Bay Detainee Litig.*, No. 08-mc-442 (D.D.C. July 2, 2008).

Petitioners moved for an order barring the government from transferring them from Guantanamo Bay without thirty days' notice to the court and to petitioners. Pet. App. 32a. The coordinating judge granted the motion. *Id.* at 32a-33a. The judge's omnibus order applied to nearly all of the more than 100 Guantanamo habeas cases then pending.

3. The government appealed, and the court of appeals consolidated the appeals and held them in abeyance pending its decision in *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010) (*Kiyemba II*), which presented the same issue.

4. a. In April 2009, the court of appeals issued its decision in *Kiyemba II*, holding that, in light of the government's post-transfer humane-treatment policy, a court may not "bar[] the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country." 561 F.3d at 516. In reaching that conclusion, the court relied on *Munaf* v. *Geren*, 553 U.S. 674 (2008), in which this Court held that a district court could not enjoin the transfer to Iraqi authorities of American citizens detained in Iraq by an international coalition force that included the United States military. *Id.* at 681-684, 700. Petitioners in that case alleged that they feared torture by the Iraqi government, but the Court explained that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 700. The Court noted the government's statement that it would not transfer the petitioners if it believed that torture was more likely than not to result, and it held that judicial review of the Executive's determination respecting the likelihood of torture would be improper because "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702.

The court of appeals in *Kiyemba II* noted that the record "documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured" and shows that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." 561

F.3d at 514. The court concluded that courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee." *Ibid.* A contrary result was not required by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, or implementing legislation, the court held, because "Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal." *Kiyemba II*, 561 F.3d at 514. The court of appeals also held that an order requiring 30 days' pre-transfer notice was improper. Such an order, the court explained, "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515.

b. After unsuccessfully seeking rehearing en banc, the *Kiyemba II* petitioners filed a petition for a writ of certiorari, which this Court denied. 130 S. Ct. 1880 (2010).

5. After this Court denied certiorari in *Kiyemba II*, the court of appeals issued an order directing petitioners to show cause why the omnibus order at issue here should not be vacated in light of *Kiyemba II*. Pet. App. 30a. In an unpublished order, the court of appeals then vacated the omnibus order. *Id.* at 26a.

ARGUMENT

In *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010), the court of appeals correctly applied this Court's decision in *Munaf* v. *Geren*, 553 U.S. 674 (2008), in concluding that a court may not bar the transfer of a Guantanamo detainee to a

foreign country based on a detainee's challenge to the government's determination that he is not more likely than not to be tortured, nor may it require the government to provide notice before a detainee is transferred in order to facilitate such a challenge. The court of appeals has repeatedly reaffirmed *Kiyemba II*, and this Court has declined to review it. See *Kiyemba* v. *Obama*, 130 S. Ct. 1880 (2010); accord *Mohammed* v. *Obama*, 131 S. Ct. 32 (2010) (denial of application for stay); *Naji* v. *Obama*, 131 S. Ct. 32 (2010) (same).[1] In the unpublished order in this case, the court of appeals applied *Kiyemba II* to vacate the district court's omnibus order requiring notice before transfer. The order of the court of appeals does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. As an initial matter, many of the petitioners on whose behalf the petition was purportedly filed—petitioners in more than 100 habeas cases—have waived or forfeited the right to challenge the omnibus order at issue in this case. After this Court denied certiorari in *Kiyemba II*, the court of appeals issued an order requiring petitioners to show cause why the district court's order should not be vacated in light of *Kiyemba II*. Pet. App. 30a. In response to that order, some petitioners consented to the vacatur of the notice order in their cases, and many petitioners filed no response whatsoever. Responses contending that the notice order should

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[1] The court of appeals recently denied a petition for initial en banc hearing in a case that, yet again, sought to challenge *Kiyemba II*. *Abdah* v. *Obama*, No. 05-5224 (D.C Cir. Jan. 11, 2011). Petitioners' suggestion (Pet. 3 n.3) that this Court should hold their petition pending resolution of the en banc petition in *Abdah* has thus been overtaken by events.

be maintained were filed on behalf of petitioners in only thirty of more than 100 habeas cases. Pet. C.A. Mot. (June 1, 2010). Those petitioners who consented to the vacatur of the district court's order or who filed no response to the court of appeals' order to show cause have waived or forfeited their right to seek further review in this Court.

2. The court of appeals' unpublished order applying *Kiyemba II* to this case does not warrant further review. *Kiyemba II* was correctly decided, and this Court properly denied review of that decision.

In *Kiyemba II*, the court of appeals held that where the government has provided sworn declarations explaining that it will not transfer a detainee to any country where it is more likely than not that he will face torture, "a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country." 561 F.3d at 514. Because a court may not enjoin a transfer on those grounds, there is no basis for an order requiring advance notice before a transfer takes place. Moreover, a "requirement that the Government provide pre-transfer notice" would be improper for the additional reason that it would "interfere[] with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515. As the court in *Kiyemba II* explained, "[l]ater review in a public forum of the [State] Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture * * * and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.* (internal quotation marks omitted); see Williamson Decl.

¶ 10; Fried Decl. ¶ 10. The declarations in this case further explain that the State Department's "ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion." Williamson Decl. ¶ 9; Fried Decl. ¶ 9. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting." Williamson Decl. ¶ 10; Fried Decl. ¶ 10.

The holding of *Kiyemba II* is fully consistent with this Court's decision in *Munaf*. As the court of appeals explained in *Kiyemba II*, the reasoning of *Munaf* "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country" where, as here, "[t]he Government has declared its policy" not to transfer a detainee if torture would more likely than not result. 561 F.3d at 516. In *Munaf*, United States citizens detained in Iraq by coalition forces that included the United States military sought to block their transfer to the custody of the Iraqi government, claiming that they would be tortured if transferred. While recognizing that the allegations were "a matter of serious concern," the Court did not assess their strength or validity. Instead, the Court made clear that such determinations are properly addressed to the political Branches, which are "well situated" to determine "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is." 553 U.S. at 702. By contrast, the Court observed that "[t]he Judiciary is not suited to second-guess such determinations" and that judicial interference would "undermine the Government's ability to speak with one voice" in the foreign policy arena. *Ibid.*

3. Petitioners make no attempt to dispute those principles but instead "incorporate" (Pet. 6) arguments presented in a separate petition in *Mohammed* v. *Obama*, No. 10-746 (filed Nov. 5, 2010). This Court has not consolidated *Mohammed* with this case, nor did any of the courts below consolidate the two cases.

In any event, the arguments in the *Mohammed* petition lack merit. That petition suggests (*Mohammed* Pet. 12-15) various grounds on which *Munaf* might be distinguished, but none is persuasive. For example, it is true that petitioners in *Munaf* sought to avoid transfer to a sovereign government for criminal proceedings, see 553 U.S. at 689, while petitioners here potentially seek to avoid transfer even where no criminal proceedings are contemplated. But the fact that *Munaf* concerned a transfer for criminal proceedings did not inform the Court's analysis of petitioners' claims that they would be tortured if transferred to the Iraqi government. See *id.* at 700-703. Nor would there be any basis for holding that courts are "suited to second-guess * * * determinations," *id.* at 702, concerning the likelihood of torture upon transfer when no criminal prosecution is contemplated but not otherwise. In both circumstances, judicial review "would require federal courts to pass judgment" on foreign governments and would "undermine the Government's ability to speak with one voice in this area." *Ibid.*[2]

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[2] The *Mohammed* petition (*Mohammed* Pet. 15.) also seeks to distinguish *Munaf* on the ground that "unlike Mr. Mohammed's case, neither *Munaf* nor *Kiyemba II* involved a petitioner's claim that he faced likely torture at the hands of private parties." That argument appears to be specific to the petitioner in *Mohammed* and is not identified in the certiorari petition in this case as applicable to the petitioners here.

The *Mohammed* petition also suggests (*Mohammed* Pet. 16) that petitioners have a due process right to challenge a transfer to another country. That argument, too, is foreclosed by *Munaf*, which rejected a due process challenge by United States citizen detainees to their transfer. See 553 U.S. at 700 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."). It follows that the alien petitioners here have no due process right to challenge a determination by the Executive that a detainee is not more likely than not to be tortured in the proposed country of transfer. Nor can petitioners claim a right to advance notice of transfer where the notice could not provide them any relief. See *Estes* v. *Texas*, 381 U.S. 532, 542 (1965); *Kiyemba II*, 561 F.3d at 517-520 (Kavanaugh, J., concurring).

The *Mohammed* petition also asserts (*Mohammed* Pet. 17-18) that *Kiyemba II* conflicts with *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and the Suspension Clause, U.S. Const. Art. I, § 9. Those arguments are inconsistent with *Munaf*, which was decided the same day as *Boumediene*. As already explained, *Munaf* expressly recognized that there are circumstances in which habeas relief is unavailable to a petitioner who seeks an order barring a proposed transfer on the basis of an asserted fear of torture, where the government has determined that torture is not more likely than not to result. *Munaf* thus directly contradicts the argument that there is a free-standing right under the Suspension Clause to seek an order barring transfer on the ground of an alleged fear of torture.

Finally, although the *Mohammed* petition adverts (*Mohammed* Pet. 17) to the question whether habeas relief would be available to review proposed transfers to locations beyond the reach of the writ of habeas corpus for further detention on behalf of the United States, the petition in this case does not contend that any of the potential transfers at issue here are of that type, nor does it argue that the notice orders should be maintained to ensure that petitioners receive notice of any such transfers. Petitioners thus have forfeited any argument that they should be permitted to challenge transfers for further detention on behalf of the United States. In any event, the United States does not engage in such detention arrangements. See Hodgkinson Decl. ¶ 5 (explaining that if an individual is detained after transfer, that detention would be "by the foreign government pursuant to its own laws and not on behalf of the United States").

4. Petitioners contend (Pet. 6-8) that legislation implementing Article 3 of the CAT gives them a right to judicial review of their transfer. As the court of appeals explained in *Kiyemba II*, however, Article 3 of the CAT is not self-executing, and the legislation implementing it does not provide a basis for judicial review of Executive Branch CAT determinations outside of immigration proceedings. 561 F.3d at 514-515. In giving its advice and consent to ratification of the CAT, the Senate declared that "the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198 (1990). Thus, the provisions are not, by themselves, privately enforceable in United States courts. See *Medellin* v. *Texas*, 552 U.S. 491, 505 & n.2 (2008); *Mironescu* v. *Costner*, 480 F.3d 664, 666, 677 n.15 (4th Cir. 2007), cert. denied, 552 U.S. 1135 (2008).

Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note), to implement Article 3 of the CAT, but that legislation does not provide for judicial review of the government's post-transfer humane-treatment determinations in the Guantanamo context. Specifically, the FARRA provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]." FARRA § 2242(d), 112 Stat. 2681-822. Petitioners are not subject to—and do not seek judicial review of—a final order of removal entered under the removal provisions of the Immigration and Nationality Act, which apply to aliens who are physically present in the United States. See *Sale* v. *Haitian Ctrs. Council*, 509 U.S. 155, 173 (1993). Nor is there any affirmative indication in the FARRA that Congress otherwise intended to create any private right to enforce Article 3 of the CAT, which is non-self-executing, in proceedings such as these brought by aliens outside the United States. See *id.* at 188 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

Congress reaffirmed the limitation in Section 2442(d) of the FARRA in 2005, when it enacted a statute providing that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review * * * shall be the sole and exclusive means for judicial review of any cause or claim" arising

under the Convention, with one exception not relevant here. 8 U.S.C. 1252(a)(4).[3]

Accordingly, Article 3 of the CAT by itself creates no privately enforceable rights, and the FARRA and 8 U.S.C. 1252(a)(4) do not provide for private enforcement of the Convention here, where petitioners attempt to assert rights under Article 3 extraterritorially and in a

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[3] Petitioners argue (Pet. 7-8) that the limitation in section 1252(a)(4) applies only in cases in which CAT claims may be asserted as part of a petition for review of an order of removal, contending that such a result follows from the title of 8 U.S.C. 1252—"Judicial Review of Orders of Removal." But, as already explained, Section 1252(a)(4) merely confirmed the limitation on jurisdiction already established in the FARRA, which is written in broad terms and does not bear a similar title. In any event, "[w]here," as here, "the statutory text is clear, the title of a statute * * * cannot limit the plain meaning of the text." *Demore* v. *Kim*, 538 U.S. 510, 535 (2003) (internal quotation marks omitted) (second alteration in original).

Petitioners' reading of Section 1252(a)(4) also fails because it would make that subsection entirely redundant with the subsection that follows it, 8 U.S.C. 1252(a)(5). See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). Section 1252(a)(5)—which was enacted at the same time as Section 1252(a)(4), see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(B), 119 Stat. 310-311—provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." If, as petitioners believe, Section 1252(a)(4) bars habeas review of CAT claims only when those claims could be asserted in a petition for review of a final order of removal, then Section 1252(a)(4) is entirely unnecessary because Section 1252(a)(5) already bars habeas review of *all* claims that could be asserted in a petition for review. Petitioners' legislative history argument (Pet. 8) fails for the related reason that it pertains not to 8 U.S.C. 1252(a)(4) but to Section 1252(a)(5) and other related provisions enacted at the same time as Section 1252(a)(4).

non-immigration context. See *Munaf*, 553 U.S. at 703 n.6 (observing that FARRA "may be limited to certain immigration proceedings"); *Khouzam* v. *Attorney Gen.*, 549 F.3d 235, 245 (3d Cir. 2008) (holding that Section 1252(a)(4) precludes the assertion of jurisdiction over a habeas petition raising CAT claims); *Mironescu*, 480 F.3d at 674 (holding that "although courts may consider or review CAT or FARR[A] claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims"); but see *Trinidad y Garcia* v. *Benov*, 395 Fed. Appx. 329, 331-332 (9th Cir. 2010) (holding that prior circuit precedent dictated a holding that CAT claims are judicially reviewable in the extradition context but noting that "[i]f we were writing on a clean a slate, we would hold that the Government has the better of the argument"), petition for reh'g en banc granted (Feb. 28, 2011).[4]

Petitioners contend (Pet. 8-9), in the alternative, that 8 U.S.C. 1252(a)(4) amounts to an unconstitutional suspension of the writ of habeas corpus if it does not permit them to assert CAT Article 3 claims here. But the FARRA and Section 1252(a)(4) did not "suspend" a pre-existing authority to adjudicate such claims in habeas corpus actions. Because Article 3 of the CAT is not self-executing, the question is whether the statutes conferred on courts the authority to adjudicate CAT Article

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[4] The Ninth Circuit's decision in *Trinidad y Garcia* arose in the distinct context of extradition from the United States, and for that reason alone would not suggest that review would be warranted in this case involving aliens detained at Guantanamo Bay. In any event, on February 28, 2011, the Ninth Circuit granted rehearing en banc in *Trinidad y Garcia*, thereby demonstrating that the Ninth Circuit will reconsider the issue there and rendering review by this Court all the more unwarranted.

3 claims beyond the immigration context in habeas corpus actions, and *Kiyemba II* properly held that they did not.

Moreover, the FARRA and Section 1252(a)(4) do not bar habeas jurisdiction altogether; they bar habeas jurisdiction only over claims arising under the CAT, which itself creates no judicially enforceable rights. The Suspension Clause does not require Congress to provide detainees with the right to enforce non-self-executing provisions of treaties in habeas. See *Noriega* v. *Pastrana*, 564 F.3d 1290, 1294 (11th Cir. 2009) (holding that Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, which prohibits petitioners from invoking the Geneva Conventions as a source of rights, does not violate the Suspension Clause because it "at most changes one substantive provision of law upon which a party might rely in seeking habeas relief"), cert. denied, 130 S. Ct. 1002 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2011

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* The Acting Solicitor General is recused in this case.